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11 KNA INTERIOR DESIGNS

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JONATHAN BROWNING, INC.,

Plaintiff,

v.

VENETIAN CASINO RESORT, LLC,
LAS VEGAS SANDS, LLC, LAS VEGAS
SANDS CORP., and DOES 1 through 100,
inclusive,

Defendants.

CASE NO. C 07-3983 JSW

Hearing Set: June 13, 2008 at 9:00 a.m.

THIRD PARTY DEFENDANT KNA
INTERIOR DESIGNS' REVISED
MOTION TO DISMISS OR STAY AND
COMPEL ARBITRATION

VENETIAN CASINO RESORT, LLC,
LAS VEGAS SANDS, LLC, LAS VEGAS
SANDS CORP.,

Third-Party Plaintiffs,

v.

KIRK NIX ASSOCIATES INC. D/B/A
KNA INTERIOR DESIGNS, a California
corporation,

Third-Party Defendant.

1 **I. HEARING**

2 This motion is scheduled to be heard before the Hon. Jeffrey S. White on June 13,
3 2008, at 9:00 a.m.

4 **II. MOTION**

5 Third-Party Defendant Kirk Nix Associates Inc. d/b/a KNA Interior Designs
6 (“KNA”) respectfully moves this Court under Fed. R. Civ. Proc. 12(b)(1) and (6) for an
7 order to stay or dismiss and compel arbitration of third party plaintiffs’ claims against
8 KNA because this Court lacks subject matter jurisdiction over the asserted claims. The
9 parties have conferred in good faith on the substance of this motion but were unable to
10 resolve the issues. KNA relies on the following Points and Authorities and the Declaration
11 of Johnathan E. Mansfield, and its attached exhibits, in support of this Motion.

12 **III. POINTS AND AUTHORITIES**

13 **A. Factual Background**

14 **1. The Parties**

15 KNA is a corporation based in Los Angeles, California that offers interior design
16 consulting services. Venetian Casino Resort, LLC (“Venetian”) is a limited liability
17 company based in Las Vegas, Nevada that operates the Venetian Resort Hotel Casino
18 (“Hotel”). On information and belief, Las Vegas Sands, LLC is the managing member of
19 Venetian Casino Resort, LLC, and is wholly owned by Las Vegas Sands Corporation, both
20 of which have their principal place of business in Las Vegas, Nevada. Plaintiff in the
21 underlying action, Jonathan Browning, is a designer and seller of products that allegedly
22 include wall-mounted lighting sconces.

23 **2. The Allegations**

24 In their Amended Third Party Complaint filed in April 2008, Venetian and Las
25 Vegas Sands, LLC and Las Vegas Sands Corporation (“Third-Party Plaintiffs”) allege they
26 contracted with KNA for interior design consulting services in connection with a planned
27 upgrade and remodel of the Hotel (the “Contract”), and that KNA agreed to indemnify
28 Third-Party Plaintiffs for any damages caused by “any act or omission of [KNA] under this

[Contract]” or “the negligent or intentionally wrongful performance” of its professional services under the Contract. According to the Third-Party Plaintiffs, KNA must indemnify them for any damages allegedly incurred by plaintiff Jonathan Browning, Inc in the underlying lawsuit against Third-Party Plaintiffs for alleged infringement of Jonathan Browning Inc.’s rights under the Copyright Act, and various state law torts (collectively “Underlying Claims”). The Underlying Claims arise out of Third-Party Plaintiffs’ alleged copying and/or inducement to copy and display Jonathan Browning Inc.’s lighting fixture designs, which Jonathan Browning claims are protected by copyright and other law.

Third-Party Plaintiffs’ Amended Complaint asserts causes of action against KNA for contractual indemnity, equitable indemnity and breach of contract. Third-Party Plaintiffs also allege their demands to KNA for indemnification have been ignored by KNA. Accordingly, Third-Party Plaintiffs have made a claim for declaratory relief, asking this Court to determine “KNA’s indemnification obligations.”

3. Third Party Plaintiffs and KNA Agreed to Arbitrate This Dispute.

The Contract containing the indemnity provision upon which Third-Party Plaintiff’s First Cause of Action for Contractual Indemnification is based, also contains the parties’ agreement to arbitrate (“Arbitration Provision”) any and all claims made pursuant to or arising out of or relating to the Contract. Specifically the Contract states:

* * *[Venetian] and [KNA] agree that legal proceedings arising out of **any claims made pursuant to this Agreement** will be arbitrated in Las Vegas, Nevada in accordance with the arbitration terms and conditions set forth in subsection (d) below.

(d) Any controversy or claim **arising out of or relating to this Agreement** or the breach of this Agreement shall be settled by arbitration administered by the American Arbitration Association under its Dispute Resolution Rules applicable to the subject of this Agreement and judgment on the award rendered by the arbitrators may be entered in any court of competent jurisdiction.

Declaration of Johnathan E. Mansfield (“Mansfield Decl.”) at Exhibit A, p. 15 (emphasis added). The term “Agreement” used in this provision is synonymous with “Contract” as

1 that term is defined both in this Motion and in Third Party Plaintiff's Amended Third Party
2 Complaint.¹

3 The Arbitration Provision also provides that arbitration is the parties' exclusive
4 remedy. Furthermore, the parties "expressly waive[] the right to pursue redress in any
5 other forum." *Id.*

6 **B. The Court Should Dismiss the Amended Third Party Complaint**
7 **Pursuant to the Parties' Agreement to Arbitrate.**

8 **1. The Court Must Enforce Arbitration Agreements Pursuant to**
9 **Their Terms.**

10 Congress enacted the Federal Arbitration Act ("FAA") to reverse the long-standing
11 judicial hostility to arbitration agreements "and to place arbitration agreements upon the
12 same footing as other contracts."² Thus, the FAA promotes a "liberal federal policy
13 favoring arbitration agreements," and "questions of arbitrability must be addressed with a
14 healthy regard for the federal policy favoring arbitration."³

15 Under the FAA, arbitration agreements are presumed to be valid and enforceable.⁴
16 The Supreme Court has held that the FAA "leaves no place for the exercise of discretion
17 by a district court, but instead mandates that district courts shall direct the parties to
18 proceed to arbitration."⁵ Accordingly, arbitration agreements falling within the scope of
19 the FAA "must be 'rigorously enforce[d].'"⁶ The FAA preempts any state law "to the
20 extent that it stands as an obstacle to the accomplishment and execution of the full
21 purposes and objectives of Congress."⁷

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23 ¹ The Agreement attached as Exhibit A to the Mansfield Decl.

24 ² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

25 ³ *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

26 ⁴ *Shearson/American Express v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

27 ⁵ *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added).

28 ⁶ *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (citations omitted).

⁷ *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 477 (1989).

Under the FAA, a district court must stay or dismiss and compel arbitration where:
 (1) a valid agreement to arbitrate exists; and (2) the claims at issue fall within the scope of that agreement.⁸ In this case, there is a clear agreement to arbitrate that covers the claims at issue in this case, and therefore the Court should order the parties to arbitration.

2. The Court Determines Only the Existence and Applicability of the Parties' Arbitration Agreement.

The parties' Contract provides that Nevada law applies to the parties' dispute.⁹ Under Nevada law, courts decide only "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate."¹⁰ Thus, this Court has subject matter jurisdiction over these third party claims only to the extent that any party challenges the *existence* of the arbitration agreement or whether the pending claims are *subject to* it. Furthermore, unless the Court orders otherwise, an arbitration may proceed while final resolution of existence and applicability issues is pending.¹¹

Under Nevada law, the arbitrator decides "whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable."¹² Thus, this Court lacks subject matter jurisdiction to decide any challenge to the *enforceability* of the parties' contractual arbitration agreement. Once this Court has determined that an arbitration agreement *exists* and that the parties' controversy is *subject to it*, the Court should dismiss the third party claims in favor of arbitration. Consequently, it is appropriate for this Court to stay any action on these third party claims pending the Court's determination of the existence and/or applicability of the arbitration agreement.

⁸ See, e.g., *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

⁹ Mansfield Decl. at Ex. A, p. 15.

¹⁰ Nev. Rev. Stat. Ann. § 38.219(2).

¹¹ Nev. Rev. Stat. Ann. § 38.219(4).

¹² Nev. Rev. Stat. Ann. § 38.219(3).

3. An Agreement to Arbitrate Clearly Exists.

There is no question that Third-Party Plaintiffs and KNA have agreed to arbitrate any disputes “pursuant to” or “arising out of or relating to” their Contract. (Mansfield Decl. at Ex. A, p. 15, ¶11(d)(i)). The writing (Ex. A) and the parties’ current performance under the terms of the Contract demonstrates that an agreement to arbitrate exists. Exhibit A to the Mansfield Decl.

4. The Arbitration Agreement Encompasses all of Third Party Plaintiffs’ Third Party Claims

The party resisting arbitration bears the burden of showing that the arbitration provision does not encompass the claims at issue.¹³ “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”¹⁴

The Arbitration Provision at issue here is extremely broad. It provides that all claims made “pursuant to” or “arising out of or relating to” the Contract must be arbitrated. (Mansfield Decl. at Ex. A, p.15, ¶11(c) and (d)(i)). It provides that arbitration is the parties’ exclusive remedy. *Id.* at ¶11(d)(i). The parties expressly waived any right to pursue remedies in a non-arbitral forum. *Id.* at ¶11(d)(iii). It was Third-Party Plaintiff, Venetian, who drafted the Arbitration Provision at issue, and it was Venetian who drafted the statement that “[KNA] understands and agrees that it is waiving its right to a jury trial, ***or a trial before a judge in public court.***” *Id.* at ¶11(d)(vi)(emphasis added). Having drafted the acknowledgement, Third Party Plaintiffs cannot now be heard to argue that they did not understand they too were voluntarily waiving these rights. Third-Party Plaintiffs’ claims are pursuant to, arise out of or relate to the Contract or a breach of the Contract. Third-Party Plaintiffs’ First Cause of Action is in fact for contractual indemnity, and based upon the indemnification provision in the Contract. *Amended Third Party Complaint* at ¶¶11-18.

¹³ *Green Tree Fin. Corporation - Alabama v. Randolph*, 531 U.S. 79, 92 (2000).

¹⁴ *Moses H. Cone*, 460 U.S. at 24-25. “In reviewing arbitration agreements, the issue of ‘[w]hether a dispute is arbitrable is essentially a question of construction of a contract.’” *Kindred v. Second Judicial District Court*, 996 P.2d 903, 907 (Nev. 2000) (quoting *Clark Co. Public Employees v. Pearson*, 798 P.2d 136, 137 (Nev. 1990))

1 Third-Party Plaintiffs' Second Cause of Action is styled "Equitable Indemnity." All
 2 of the allegations in this claim describe acts or omissions that were allegedly undertaken
 3 by KNA *pursuant to* or in *relation to* or that *arise out of* duties under the Contract: the
 4 alleged design and overseeing of production of light fixtures installed at the Venetian
 5 (*Amended Third Party Complaint* at ¶21), alleged supervision of the design and
 6 manufacture of the light fixtures (*Amended Third Party Complaint* at ¶22), the alleged
 7 approval of final drawings for the light fixtures and submission to the manufacturer
 8 (*Amended Third Party Complaint* at ¶23). Assuming for purposes of this motion that KNA
 9 did any of those things, KNA did so only pursuant to the Contract. It is the contractual
 10 language that will determine the resolution of any alleged equitable issues. This claim
 11 clearly "arises out of" and is "relating to" the Contract.

12 For their Third Cause of Action, Third-Party Plaintiffs allege KNA breached the
 13 Contract itself by allegedly failing to obtain or maintain required insurance coverage (as
 14 specified in the Contract), and failed to name Third-Party Plaintiffs as additional insureds.
 15 (*Amended Third Party Complaint* at ¶¶32-33). The Arbitration provision expressly covers
 16 any claim or controversy arising out of or relating to a "breach of this [Contract]." (Ex. A
 17 to *Mansfield Decl.* at ¶11(d)(i)).

18 Finally, Third-Party Plaintiffs seek a declaration that KNA has a duty to indemnify
 19 them pursuant to the terms of the *Contract*. The determination of duties under the terms of
 20 the Contract is necessarily a claim arising out of the Contract, and is thus subject to the
 21 Arbitration provision.

22 5. Conclusion

23 There is no question that the parties' Contract contains an agreement to arbitrate.
 24 There is also no question that Third Party Plaintiffs' four claims all arise out of or relate to
 25 the Contract. That is the only conclusion that can be drawn from the facts alleged in the
 26 Amended Third Party Complaint. Since the parties agreed to arbitrate any and all such
 27 claims, this Court should dismiss the Amended Third Party Complaint in its entirety in
 28 favor of arbitration.

1 C. **If This Court Does Not Immediately Dismiss the Third Party Claims, the**
2 **Court Should Stay Any Further Action on these Third Party Claims**
3 **Until It Resolves the Arbitrability Question.**

4 Unless the Court orders otherwise, an arbitration may proceed while final resolution
5 of arbitrability questions or the existence of an agreement to arbitrate is pending.¹⁵ If the
6 Court does not immediately resolve arbitrability questions and dismiss this third party
7 action, it should issue an order staying any further proceedings on these Third Party
8 Claims, including any discovery.¹⁶

9 Dated this 23rd day of April, 2008.

10
11 Respectfully submitted,

12 Schwabe, Williamson & Wyatt, P.C.

13
14 By: /s/ Johnathan E. Mansfield

15 Johnathan E. Mansfield

16 Attorneys for Third-Party Defendant, KIRK
17 NIX ASSOCIATES INC., D/B/A KNA
18 INTERIOR DESIGNS
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27 ¹⁵ Nev. Rev. Stat. Ann. § 38.219(4).

28 ¹⁶ *See, e.g., Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

CERTIFICATE OF SERVICE

I am a resident of the State of Oregon, I am over the age of 18 years, and I am not a party to this lawsuit. My business address is 1211 SW Fifth Avenue, Suite 1900, Portland, Oregon 97204. On the date listed below, I served the following document titled: THIRD PARTY DEFENDANT KNA INTERIOR DESIGNS' REVISED MOTION TO DISMISS OR STAY AND COMPEL ARBITRATION, in the manner indicated:

- ☒ via electronic means to the E-mails listed.
- ☒ by placing the document listed above in a sealed envelope to the person(s) at the address set forth below with first class postage thereon fully prepaid and deposited said envelope with the United States Postal Service on the same date set out below.

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12 I declare under penalty of perjury under the laws of the State of Oregon that the
13 above is true and correct.

14
15 Executed April 23, 2008, at Portland, Oregon.

16
17
18 /s/ Anita Erickson
19 Anita Erickson